APPENDIX A

Opinion of the Court of Appeals for the Second Circuit in United States ex rel. Chestnut, et al. v. Criminal Court of the City of New York, et al., Docket No. 35,650, May 5, 1971:

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 717—September Term, 1970.

(Argued April 13, 1971 Decided May 5, 1971.)

Docket No. 35650

UNITED STATES OF AMERICA *ex rel.* OTIS CHESTNUT, MICHAEL BROWN, STEPHEN MARTINOT, ELLEN SHALLIT and LEVI LAUB,

Appellants,

—v.—

CRIMINAL COURT OF THE CITY OF NEW YORK, GEORGE F. MCGRATH, Commissioner of Corrections of the City of New York, and FRANK S. HOGAN, District Attorney of New York County,

Appellees.

Before:

WATERMAN, SMITH and KAUFMAN,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Harold R. Tyler, Jr., *Judge,* denying appellants' petition for a writ of habeas corpus.

Affirmed.

BASIL R. POLLITT, New York, N. Y. (Sanford M. Katz, New York, N. Y., of counsel), *for appellants.*

DAVID OTIS FULLER, JR., Assistant District Attorney (Frank S. Hogan, District Attorney, New York County, Michael R. Juviler, Assistant District Attorney, of counsel), *for appellees.*

KAUFMAN, *Circuit Judge*:

Petitioners, appealing from the denial of a writ of habeas corpus, have fashioned a wide-ranging challenge to the constitutionality of the New York County (Manhattan) grand jury selection system as it operated in 1964.

Appellants were prosecuted and convicted for criminal contempt upon the recommendation of the Second August 1964 Grand Jury, for refusing to answer questions put to them by that grand jury. Their primary defense at trial was that the jury was unrepresentative of the population of the local community in several respects, and hence that the prosecution denied them due process and equal protection of the law. Extensive factual hearings were conducted concerning grand jury selection practices. Petitioners' convictions in the New York City Criminal Court were unanimously affirmed by the New York Court of Appeals on the ground that the departures from perfect representativeness demonstrated below did not result from unconstitutional exclusionary practices. 26 N.Y.2d 481 (1970) (Fuld, *Chief Judge*).

Appellants' habeas corpus petition raised substantially the same claim of unrepresentativeness. On October 5, 1970, Judge Tyler denied the petition without conducting a hearing. We affirm.

I.

The grand jury under attack was convened to investigate serious civil disturbances that had broken out in

Harlem during the preceding month. Petitioners were called to testify and granted immunity from any prosecution related to the occurrences under investigation. The grand jury requested simple "yes" or "no" answers to a series of questions concerning three targets of the investigation and suspected plans to instigate rioting by sniper fire. Two of the five petitioners requested a judicial ruling on the relevance and legality of the questions. A Justice of the Supreme Court, New York County, declined the request on the ground that petitioners were ably represented by counsel. Petitioners then refused to answer the questions, and the grand jury directed the district attorney to file informations charging criminal contempt. These informations were later filed in the Supreme Court.

After an unsuccessful attempt to remove the prosecution to the federal courts, see *Chestnut* v. *New York*, 370 F.2d 1 (2d Cir. 1966), cert. denied, 386 U.S. 1009 (1967), a hearing was held by Justice Murtagh of the Supreme Court on petitioners' charge that the grand jury selection process as administered in Manhattan resulted in the unconstitutional exclusion of significant portions of the population qualified for jury service.[1] The evidence developed at that hearing disclosed that grand jury service, unlike petit jury service, was entirely voluntary. Citizens were invited rather than summoned to participate. Solicitations to place one's name on the grand jury list, which in 1964 numbered approximately 2,000, were periodically mailed to persons selected at random from the county petit jury list. In 1964, however, no grand jury invitations were sent to potential petit jurors under 35 years of age, or over 65. No more than a third of the addressees responded to these

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1 The hearing was held upon the petitioner's motion that the earlier grant of approval by the Supreme Court to the filing of the contempt informations, be revoked. See N.Y. City Crim. Ct. Act §42.

letters, and many of those who did answer affirmatively later withdrew upon learning that, contrary to their assumption, grand jury service was not compulsory. The remaining prospective jurors were interviewed by a Deputy County Clerk, and an investigation was made to uncover any prior criminal record, outstanding judgments or pending litigation.[2] Although former Judiciary Law §596 (3), not repealed until 1967, required that grand jurors

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2 In greater detail, the selection process entails the following: New York County jurors must be residents of the county, must not have been convicted of a felony or a misdemeanor involving moral turpitude, and must be "intelligent; of sound mind and good character; well informed; [and] able to read and write the English language understandingly." Judiciary Law §596. Exemptions from jury service are available for women, persons over 70, and such professions as clergymen, physicians, attorneys, policemen and members of the armed forces. *Id.* §599. Prospective grand jurors are furnished with a questionnaire which elicits information concerning disqualifications and exemptions from jury service. The form of the questionnaire is prescribed by Rule 17 of the Rules of the Jury System in the City of New York, promulgated by the Appellate Divisions, First and Second Departments pursuant to the authority vested in them by Judiciary Law §609. The Deputy County Clerk then conducts a personal interview with prospective grand jurors. At that time he reviews the completed questionnaire with them. The Deputy Clerk may thereafter remove the names of prospective jurors who, based on the questionnaire and interview, he concludes are disqualified or have a valid exemption from service, noting briefly the ground for removal. The names of jurors not removed are then forwarded to the local police and their fingerprints sent to the Bureau of Criminal Identification in Albany, for a prior criminal record search. A credit check is also made to determine the existence of outstanding judgments or liens. A juror is disqualified on this ground only if the "flagrant" nature or large number of such outstanding obligations strongly indicates his unreliability. The list of potential grand jurors remaining after the interview and investigation process is then forwarded to the County Jury Board, consisting of the Presiding Justice of the Appellate Division or his designee from the Appellate Division bench; two Supreme Court justices designated by the Appellate Division; and the County Clerk, who acts as the Board's secretary. Judiciary Law §591. The Board then draws up the annual grand jury list for the following year. During the years 1960-1964 the Board rejected no more than 15 of the approximately 200 new names submitted to it each year for addition to the grand jury list. See generally *id.* §609.

must own property worth at least $250, the jury clerks testified that they had ceased to enforce this requirement no later than 1960 on the assumption that anyone with clothes on his back had assets of over $250. It was, however, the practice to exclude welfare recipients from both grand and petit jury service.[3] The names of persons accepted as grand jurors were then added to the grand jury list in the next annual cumulation.

The hearing also disclosed that the grand juror selection system resulted in the underrepresentation, when compared with the general population, of certain ethnic and economic groups. Thus, blacks comprised 1.65% of persons on the grand juror list from which the Second August 1964 Grand Jury was selected, although at the time approximately 24% of the total population of New York County between 21 and 70 years of age was Black.[4] Puerto Ricans comprised 0.3% of the jury list, compared with approximately 12% of the population. "Blue collar workers"—a loose classification based on the petitioners' own statistical analysis—comprised 1.2%[5] compared with 47% of the New York County labor force.

II.

Petitioners' argument that they were denied due process and equal protection by the mere unrepresentative composition of the 1964 grand jury list may be intuitively appealing in its simplicity but we find it logically and legally

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3 This practice, like the exclusion of potential jurors who were under 35 years of age, had no statutory basis, and was subsequently terminated.

4 Negroes comprised 14% of the population between 35 and 65 with at least a high school education. All population statistics were based upon the 1960 Census.

5 Occupational statistics were gathered from the 1966 cumulation of the grand jury list.

untenable. Such an unrepresentative body, appellants assert, cannot fulfill the democratic ideal of interposing the judgment of neutral laymen representing a cross-section of the local community between the decision of a state's prosecutor and the actual initiation of a criminal proceeding. Few will deny that such an ideal underlies the modern institution of the grand jury. Recent legislative developments in the selection of both federal and New York grand jurors reflect the vitality of the goals that petitioners articulate.[6] Federal courts, in the exercise of their supervisory powers over federal jury selection, have repeatedly struck down systems which arbitrarily exclude significant sectors of the local community. E.g., *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217 (1946) (exclusion of day laborers) (petit jury); *Ballard* v. *United States*, 329 U.S. 187 (1946) (exclusion of women); *United States* v. *Zirpolo*, Nos. 18, 137-42 (3d Cir. Dec. 3, 1970) (underrepresentation of women). Sitting as a federal court reviewing a state system, however, we are not at liberty to impose upon the State of New York our own views on which method we believe to be the ideal for grand jury selection. Our power is limited to determining whether the particular selection method chosen by New York and under review by us violated petitioners' rights to due process and equal protection, either because they were called to testify before a consti-

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6 With respect to federal jurors, see, e.g., Civil Rights Act of 1957, P.L. 85-315, §152, 71 Stat. 638 (uniform standard of qualification for federal jurors); Jury Selection and Service Act of 1968, P.L. 90-274, 82 Stat. 53 (random selection of grand and petit jurors from voter registration lists). With respect to New York State jurors, see Act of March 20, 1940, ch. 202, §1 (eliminating differences in investigations of regular petit jurors and special jurors); Act of July 15, 1965, ch. 778, §3 (elimination of "blue ribbon" special juries); Act of March 7, 1967, ch. 49 (elimination of $250 property requirement); Act of April 24, 1967 (raising maximum age of jurors from 70 to 75).

tutionally unrepresentative grand jury or because their subsequent prosecution was initiated by one.[7]

III.

Addressing ourselves first to the due process claim, we note at the outset that the Supreme Court has repeatedly held that a state may, without violating the Constitution, dispense with a grand jury altogether and initiate criminal prosecutions solely upon the prosecutor's unilateral decision to file an information. *Hurtado* v. *California,* 110 U.S. 516 (1884); *Kennedy* v. *Walker,* 337 U.S. 901 (1949); *Beck* v. *Washington,* 369 U.S. 541 (1962).[8]

We do not, however, rest our decision on this ground. Cf. *Beck* v. *Washington, supra,* 369 U.S. at 546 (assuming

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7 The district court did not consider all the petitioners' claims on the ground that the grand jury did not indict petitioners, but merely questioned them and upon their refusal to answer acted as a "complaining witness." The court concluded that the representativeness of the grand jury was therefore of little moment.

Agreeing with the premise that the grand jury assumes its greatest responsibility in deciding whether to indict, we nevertheless hold that petitioners may challenge the composition of the 1964 grand jury list. The grand jury's inquisitorial function offers many opportunities for the use of discretion. Here, for example, the decisions to question, to grant immunity, to phrase questions in yes-or-no fashion, and finally to initiate punishment for contempt, affected substantial interests of the petitioners and were neither inevitable nor ministerial. In particular, we note that the grand jury might have chosen to proceed against the recalcitrant petitioners under New York Judiciary Law §§750(A)(5), 751(1), providing a statutory maximum penalty of 30 days' imprisonment, imposed by a Supreme Court justice after an express warning to the witness and after a final opportunity to retract the decision not to testify. Instead, the grand jury ordered the filing of informations charging criminal contempt under former Penal Law §600(6), punishable by up to a year's imprisonment, *id.* §1937.

8 It may be noted that the absence of a constitutional mandate compelling the states to proceed only by grand jury indictment is some indication that the grand jury's exercise of discretion is not a "fundamental interest," possibly justifying a strict standard of review. See Development in the Law-Equal Protection, 82 Harv. L. Rev. 1065, 1127-31 (1969).

arguendo that a state which resorts to the grand jury process must furnish an impartial grand jury). The grand jury not only may check a prosecutor's decision to proceed against a defendant, but may undertake investigations and make formal accusations on its own initiative. To the extent that a grand jury once utilized not only vetoes prosecutions, but initiates them, a constitutional requirement that the jury be capable of impartiality would not be inconsistent with the principle enunciated above, that the state was not under a constitutional mandate to utilize a grand jury system in the first instance. The petitioners have nonetheless failed to demonstrate that the Second August 1964 Grand Jury was unable to act fairly and impartially. Petitioners speculate that persons who volunteer for grand jury service commonly possess authoritarian personality traits which predispose them to pay undue heed to the prosecutor and to initiate proceedings against persons who may strike them as suspicious or "criminal-type" individuals. But simple willingness to render public service may sufficiently explain a citizen's propensity to volunteer, and petitioners have presented no concrete evidence to support their darker conjecture.

As to the ethnic and economic imbalances described above, petitioners offer even less reason to suspect any resultant partiality. There is no apparent ground for assuming that a grand jury deficient in the various under-represented groups would be unduly sympathetic to the prosecutor. That Chestnut (alone among the five petitioners) was a Negro, or that all the petitioners were under 35 years of age, is relevant only to the over-simplistic and unsupported assumption that grand jurors predominantly of one race or those over 35, cannot provide a fundamentally fair hearing for persons of another race or generation.

See *Fay* v. *New York*, 332 U.S. 261 (1947) ("we are not ready to assume that . . . differences [in occupation] degenerate into a hostility such that one cannot expect justice at the hands of occupations and groups other than his own"); Note, The Defendants' Challenge to a Racial Criterion in Jury Selection, 74 Yale L.J. 918, 921-22 (1965) (suggesting that because of psychological and other factors, minority-group jurors have been known also to reflect harshness against their own group). To be sure, any partiality that may be associated with the exclusion of a given group will not easily be demonstrated. Yet it is not the office of a federal court to overthrow a state's juror selection method on the basis of mere speculation and hypothesis. The Supreme Court has recently reaffirmed the importance of objective and reliable proof of partiality as a necessary premise of federal judicial interference with state jury selection. *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968).[9]

In any event, we are of the view that the appellants' argument on this score is without force. Whatever speculative effect the volunteer system may have had on the grand jury's sense of fairness has little weight when compared with the rational conclusion of New York County officials that volunteer grand jurors would perform their

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9 In *Witherspoon*, a trial jury from which potential jurors with scruples against the death penalty had been excluded was challenged as conviction-prone. Although the hypothesis was supported by two empirical studies, the Court refused to accept the petitioner's hypothesis on the ground that the studies were "too tentative and fragmentary." 391 U.S. at 517. Petitioners here have presented no factual data of any sort, tentative or otherwise, to support their suspicion of partiality.

A statistically convincing demonstration of bias is, of course, an entirely different matter from the use of statistics as evidence of the state's intentional discrimination against a given group of potential jurors. See *Norris* v. *Alabama*, 294 U.S. 587 (1935); pp. 8-11 *infra*.

obligations—including the duty to refuse an indictment in appropriate cases—more conscientiously than jurors suffering the considerable inconvenience of jury service pursuant to a compulsory summons. Jurors over 35 may reasonably be expected to draw upon a greater fund of experience because of their previous service on petit juries and their maturity, than those under 35. And welfare recipients, who receive their sustenance from the state, might be viewed as potentially too timid to disagree with the prosecuting attorney, an important spokesman of the state from which they receive substantial benefits.[10]

IV.

Unlike the due process clause, the equal protection clause of the Fourteenth Amendment unquestionably limits the range of methods New York may adopt for choosing grand jurors. That a state could dispense with grand juries altogether does not, of course, mean that if it adopts that mechanism the state may use it in an arbitrary and discriminatory manner.

But petitioners do not and cannot claim that New York singled them out for special or discriminatory treatment because of their race or any other characteristic, nor do they charge invidious discrimination or arbitrary or irrational methods in the selection process of grand jurors. The Second August 1964 Grand Jury was selected, so far as the record reveals, exactly as was every other grand jury that sat in New York County in 1964. Cf. *Fay* v. *New York, supra,* 332 U.S. at 285-86 (special petit juror list for publicized cases); *Beck* v. *Washington, supra,* 369 U.S.

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10 In any case, the exclusion of welfare recipients had no perceptible impact on the composition of the grand jury list. See p. 10. As for the $250 property qualification, see pp. 10-11 *infra*.

at 549-50 (denial of procedural safeguards before grand jury that were provided in other cases); *Collins* v. *Walker*, 329 F.2d 100 (5th Cir.), cert. denied, 379 U.S. 901 (1964) (petit jury chosen with respect to defendant's race).

Of course, a defendant is denied equal protection if he is proceeded against by a grand jury from which members of his own race have been arbitrarily or invidiously excluded. *Strauder* v. *West Virginia*, 100 U.S. 303 (1880); *Neal* v. *Delaware*, 103 U.S. 370 (1881); *Norris* v. *Alabama*, 294 U.S. 587 (1935); *Pierre* v. *Louisiana*, 306 U.S. 354 (1939); *Smith* v. *Texas*, 311 U.S. 128 (1940); *Hill* v. *Texas*, 316 U.S. 400 (1942); *Akins* v. *Texas*, 325 U.S. 398 (1945); *Hernandez* v. *Texas*, 347 U.S. 475 (1954). We hardly need repeat again that our constitutional scheme absolutely bars invidious racial discrimination by the state. Whatever significance statistics indicating under representation of a racial group may have in other circumstances, see *Norris* v. *Alabama*, 294 U.S. 587 (1935), petitioners do not urge that the relative paucity of Negroes on the 1964 grand jury list represented purposeful and intentional racial discrimination.[11] They do not deny that the racial imbalance of the list was not the result of "an exclusionary device," *Hoyt* v. *Florida*, 368 U.S. 57, 61 (1961), but was due to New York County's system of *voluntary* grand jury service. Compare, e.g., *Fay* v. *New York*, *supra* (effect of educational and other qualifications); *Swain* v. *Alabama*, 380 U.S. 202 (1965) (effect of nonracially motivated use of peremptory challenge). Nor is it charged that the grand jury selection was infected by *private* racial discrimination. Cf. *Norwalk CORE* v. *Norwalk Redevelopment*

11 Nor can petitioners point to any history of purposeful discrimination in the past which might cast the existing departures from perfect representativeness in a different light. Cf. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 39 U.S.L.W. 4437 (U.S. April 20, 1971).

Agency, 395 F.2d 920 (1968); *Kennedy Park Homes Ass'n v. City of Lackawanna*, —— F.2d —— (1970), *petition for cert. filed*, 39 U.S.L.W. 3347 (Feb. 6, 1971).[12] In this respect there is little we can add to the opinion of Chief Judge Fuld for the unanimous New York Court of Appeals. 26 N.Y.2d 481 (1970).

Conceding the absence of purposeful discrimination, petitioners rely on instances when this court and others have required states to justify policies which, regardless of subjective intent, have substantial adverse consequences for racial minorities which have not been suffered by the community at large. E.g., *Norwalk CORE v. Norwalk Redevelopment Agency, supra; Kennedy Park Homes Ass'n v. City of Lackawanna, supra.* Cf. *Cassell v. Texas*, 339 U.S.

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12 One theory advanced to demonstrate that Chestnut was denied equal protection because of his race is premised on the proposition that the exclusion of a racial group from jury service may impose an official stamp of inferiority on persons of the same race called before the jury as well as on the excluded potential jurors. Cf. *Strauder v. West Virginia*, 100 U.S. 303, 307-08 (1880); *Swain v. Alabama*, 380 U.S. 202, 238 (1965) (Goldberg, *J.*, dissenting). But such underrepresentation of blacks as existed here, which resulted solely from their relatively lower propensity to volunteer, could hardly have conveyed any message of inferiority. Of course in an appropriate case a litigant may raise the constitutional rights of others than himself, see, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). It is not suggested, however, that the excluded potential black jurors were without a remedy for any wrong the selection system may have caused them, see 18 U.S.C. §243; *Ex parte Virginia*, 100 U.S. 339 (1880); 42 U.S.C. §1983; *Carter v. Jury Comm'n*, 396 U.S. 320 (1970), which is the usual justification for permitting the assertion of *jus tertii*. See generally Note, The Defendant's Challenge to a Racial Criterion in Jury Selection, 74 Yale L.J. 919, 932-33; Sedler, Standing To Assert Constitutional Jus Tertii in the Supreme Court, 71 Yale L.J. 599 (1962). In any event, black potential jurors who failed to volunteer for service would have little claim that their exclusion denied them any constitutional right.

Thus the only plausible basis for Chestnut's equal protection claim is the possibility that a grand jury deficient in members of his race would deal with him differently than with prospective defendants or witnesses of other races. But this speculation has not been shown to be any more than that, see pp. 6-7 *supra*.

282 (1950) (opinion of Reed, *J.*); *Hoyt* v. *Florida*, 368 U.S. 57 (1961). Assuming the propriety of demanding a similar justification in this case, a point we need not decide, the presumably greater conscientiousness of volunteer jurors as compared to jurors serving under compulsion of a summons—and nothing presented has rebutted this—sufficiently justifies New York's voluntary selection technique.

Similarly, as we have stated, in excluding jurors younger than 35 years of age, New York County presumably chose, as it may, to take advantage of the greater experiences of older persons with petit juries and life's vicissitudes. Petitioners' claim that an "entire generation" of the New York County population was thereby eliminated is hyperbole. Moreover, petitioners concede, as they must, the propriety of some minimum age limit. We need not suggest that any minimum, no matter how high, is permissible, to conclude that nothing in the Constitution dictates that New York must select the traditional third multiple of seven as an age floor on jury service, in preference to the fifth.

None of the petitioners is a Puerto Rican, a "blue collar worker," a welfare recipient or the owner of assets valued at less than $250, and they offer no plausible theory to explain how they were denied equal protection by the exclusion or underrepresentation of these groups. See *Fay* v. *New York, supra*, 332 U.S. at 287; *United States* v. *Leonetti*, 291 F. Supp. 461, 473 n. 3 (S.D.N.Y. 1968), approved in *United States* v. *Bennett*, 409 F.2d 888, 892-93 (2d Cir.), cert. denied, 396 U.S. 852 (1969). The underrepresentation of Puerto Ricans and "blue collar workers" is similar, in origin and justification, to the relative paucity of black grand jurors. And, as we have indicated, the exclusion of persons receiving welfare benefits can be supported as a precaution against over-timidity toward the authority sup-

porting them, somewhat analogous to New York's statutory exclusion of government employees, Judiciary Law §598. In any case we doubt whether this requirement had any perceptible effect upon the composition of the 1964 grand jury list in light of the uncontested fact that 90 percent of welfare recipients in that year were either disabled, over 65 years of age, receiving medical assistance, or mothers and children in homes that lacked a father. Finally, although no sufficient justification for the since repealed $250 property requirement is apparent, see *Chestnut* v. *New York*, 370 F.2d 1, 7 n. 13 (2d Cir. 1966), cert. denied, 386 U.S. 1009 (1967); *Samuels* v. *Mackell*, 288 F. Supp. 348, 356 (S.D.N.Y. 1968) (3-judge court), aff'd on other grounds, 39 U.S.L.W. 4211 (U.S. Feb. 23, 1971); *United States ex rel. Epton* v. *Nenna*, 318 F. Supp. 899 (S.D.N.Y. 1970), *appeal pending* (2d Cir. No. 35559 September 1970 Term), it ceased to have practical effect in 1960 when the New York County jury officials adopted the eminently reasonable assumption that any potential juror wearing a suit of clothes was worth at least that much. Petitioners claim that a majority of the names on the 1964 grand jury list was added before 1960. But even if this is so, we cannot believe that such a minimal property threshold had any significant effect upon the makeup of either the 1960 or 1964 list. This imperfection in the selection system, if such it was, could surely be tolerated as *de minimis*.

In upholding the district court's denial of relief, it is unnecessary for us to decide that the Second August 1964 Grand Jury, New York County, was chosen in the manner best calculated to further the democratic values embodied in the grand jury institution. We decide only that it was not chosen in a manner which denied petitioners due process or the equal protection of the laws. On that basis the judgment below is affirmed.

APPENDIX B

Opinion and order of the District Court for the Southern District of New York in United States ex rel. Chestnut, et al. v. Criminal Court of the City of New York, et al. (70 Civ. 2942 HRT), entered October 5, 1970, and opinion on rehearing entered November 4, 1970:

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 Civ. 2942 HRT

UNITED STATES OF AMERICA *ex rel.* OTIS CHESTNUT, MICHAEL BROWN, STEPHEN MARTINOT, ELLEN SHALLIT and LEVI LAUB,

Petitioners,

—against—

CRIMINAL COURT OF THE CITY OF NEW YORK; GEORGE F. MCGRATH, Commissioner of Corrections of the City of New York and FRANK S. HOGAN, District Attorney of New York County,

Respondents.

SANFORD M. KATZ, ESQ., New York City,
BASIL R. POLLITT, ESQ., New York, New York,
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FRANK S. HOGAN, District Attorney of New York County,
by

MICHAEL R. JUVILER and DAVID OTIS FULLER, JR.,
Assistant District Attorneys,
Attorneys for Respondents.

TYLER, *D.J.*

Petitions for habeas corpus, 28 U.S.C. § 2254, are denied for reasons to be hereinafter discussed.

Preliminary Statement and Essential Facts

The petitioners were sentenced by the Criminal Court of the City of New York in August, 1970 to prison terms of various lengths (30 days to 180 days) for contempt of the so-called "second August 1964 grand jury" in New York County. See former Section 600, subdivision 6, of the New York Penal Law. They are presently serving their sentences, after being released briefly on a bail order issued by this court in late July, 1970, which order was reversed on appeal by the Court of Appeals for this circuit.

Specific offenses charged in the criminal informations leading to petitioners' convictions were their refusals to answer questions before the New York County grand jury relating to the so-called "Harlem riots" of 1964. When they appeared before the grand jury, petitioners asserted their privilege against self-incrimination. The grand jury thereupon, at the suggestion of the prosecutor, granted them immunity under New York Penal Law, Section 2447. Acting under Section 42 of the New York City Criminal Court Act, the grand jury then directed the District Attorney of New York County to issue and file the information upon the approval, which was forthcoming, by an appropriate

justice or justices of the Supreme Court of New York, New York County.

After an ill-fated attempt to remove these proceedings to the United States District Court for this district, see *Chestnut* v. *New York,* 370 F.2d 1 (1966), cert. den. 386 U.S. 1009 (1967), petitioners then raised their claims of constitutional infirmities in the selection of the second August 1964 grand jury by a motion to revoke the approval by the Supreme Court of New York of issuance of aforesaid criminal informations. Mr. Justice Murtagh of that court denied petitioners' motions after a factual hearing. At the trial of petitioners before the Criminal Court of the City of New York, the hearing record before Mr. Justice Murtagh was incorporated as part of the trial record.

After conviction, appeals to the Appellate Term, First Department, were unsuccessful. Finally, a unanimous Court of Appeals for the State of New York (Fuld, Ch.J.) affirmed the convictions after full consideration of the constitutional arguments of petitioners. *People* v. *Chestnut,* —— N.Y. —— (June 4, 1970).

Petitioners Contentions

As they did before the New York courts, petitioners here claim a number of constitutional infirmities in the grand jury selection processes in New York County as they pertained in 1964. Among other things, they urge that the grand jury selection processes then in vogue amounted to a "voluntary system" for the purpose and with the result of excluding persons on the bases of race, color and economic standing within the community. It is said, for example, that Negroes and Puerto Ricans were purposefully excluded from grand jury service. Also, as respon-

dents concede in fact, it was the practice of the New York County officials to exclude virtually all persons in the age group of 21 to 35 years. Petitioners also argue that the record establishes that persons receiving welfare assistance were systematically excluded from grand jury service in 1964. Without extended discussion of these contentions, I am persuaded by the facts in the record and at least in some measure by the reasoning in the opinion of Chief Judge Fuld that, assuming their standing to raise them, petitioners' contentions regarding purposeful exclusion of persons for grand jury service on the bases of race and economic status are lacking in merit. See, generally, *United States* v. *Leonetti,* 291 F. Supp. 461 (S.D.N.Y. 1968), aff'd sub. nom. *United States* v. *Bennett,* 409 F.2d 888 (2 Cir. 1969). I also reject petitioners' argument that it was a denial of due process to have the grand jury as an "aggrieved party" performing the judicial act of directing the issuance of the criminal informations; the Supreme Court of New York authorized the citations, and the Criminal Court, not the grand jury, adjudged petitioners guilty of contempt. In my view, the only potentially substantial issues on the merits have to do with the exclusions of persons between the ages of 21 and 35[1] and persons receiving welfare assistance.[2] Nevertheless, for reasons to be briefly stated hereinafter, I do not believe that petitioners were sufficiently affected or aggrieved by the actions of the second August 1964 grand jury to raise these constitutional claims last mentioned before this court.

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[1] This exclusionary practice, it would appear, was dropped or discontinued shortly after the hearing before Mr. Justice Murtagh in 1967.

[2] It is conceded that this practice was discontinued in 1966. Petitioners' Brief, p. 8.

The Question of Petitioners' "Standing", to Raise the Constitutional Issues

Perhaps surprisingly, the question of standing, so far as can be determined, was not raised in this protracted litigation until this past August when Circuit Judge Anderson, as "duty judge" for the Court of Appeals for the Second Circuit, reviewed on several occasions the order of the undersigned to release petitioners on bail pending decision by this court on the merits of their petitions. On July 31st, Judge Anderson first considered the question of bail upon application of respondents to review and reverse the bail order of this court entered a few days earlier. On August 3, 1970, Judge Anderson filed a memorandum reasoning that even assuming a constitutional infirmity in the selection and composition of the grand jury, this was completely irrelevant to petitioners' convictions in that petitioners' real affront was to the judicial processes of the State of New York. When petitioners moved for reconsideration, Judge Anderson on August 6th filed another memorandum in which he expressed the view that under the applicable New York procedures in 1964, the grand jury was little more than a complaining witness. From this he reasoned further that it was irrelevant whether or not the grand jury was chosen under appropriate constitutional standards.

Parenthetically, it should be noted that on September 16, 1970 a full panel of the Court of Appeals refused, without opinion, to disturb Judge Anderson's rulings setting aside the bail order of this court.

As I read the memoranda of Judge Anderson, he determined in substance that petitioners have no standing to press their federal constitutional argument on habeas corpus. Upon reflection, I am constrained to reach the same conclusion, albeit by somewhat different reasoning.

It was long ago held by the Supreme Court that there is no constitutional requirement upon the states to resort to grand juries at all. *Hurtado* v. *California,* 110 U.S. 516 (1884). Although it is undoubtedly true that a state which does resort to grand juries in so doing must comply at least minimally with constitutional requirements, I believe that petitioners' arguments are infected by the erroneous notion that federal courts have unrestricted supervisory powers over state and local criminal procedures, including selection of grand juries. This is not so. In the words of Mr. Justice Jackson in *Fay* v. *New York,* 332 U.S. 261, at 287 (1947):

> "Over federal proceedings we may exert a supervisory power with greater freedom to reflect our notions of good policy than we may constitutionally exert over proceedings in state courts, and these expressions of policy are not necessarily embodied in the concept of due process."

Thus, although petitioners correctly point out that since *Fay* the Supreme Court and the lower federal courts have not hesitated in appropriate cases to review such matters as state grand jury selection procedures, see, e.g., *Hernandez* v. *Texas,* 347 U.S. 475 (1954), the distinction pointed out by Mr. Justice Jackson has continuing validity. This distinction, at the very least, requires a strong showing by petitioners that their state convictions significantly turned upon or were effected by the selection or composition of the second August 1964 grand jury—i.e. that the infirmities claimed worked directly upon petitioners a denial of either due process or equal protection of the laws. See *Fay* v. *New York, supra,* at 287; see generally, Note, The Supervisory Powers of the Federal Courts, 76 Harv.

L. R. 1655 (1963). The simple procedural facts of petitioners' cases, in my view, are sufficient to preclude any such showing.

Petitioners were not indicted or charged as a result of any fact finding, deliberative or "community policy weighing" processes of the second August grand jury. Necessarily, then, petitioners were not affected or jeopardized by the composition of that body. They were not deprived of the insights, perspectives or prejudices of any identifiable class or group such as "young adults" or welfare recipients which may not have been or was not represented among the members. All that happened was that, at the instance of the prosecutor, the grand jury told petitioners they were not targets of its investigation and were receiving immunity under applicable New York law, which immunity petitioners in effect chose to ignore. Further diluting the traditional role of the grand jury and the significance of its composition here was the ensuing procedure, mandated by New York law, of obtaining approval of a justice or justices of the Supreme Court of New York before initiating contempt procedures against petitioners. Thus, to borrow from Judge Anderson's analogy, the second August grand jury was little more than a triggering mechanism so far as petitioners' cases were concerned, and its composition had no significance in respect to its actions in respect to petitioners. There is no judicial precedent to be found suggesting, let alone holding, that under such circumstances petitioners have standing to raise claims of constitutional infirmities in the selection and make-up of the jury. Similarly, I can find nothing in the Constitution which authorizes a witness to ignore a state grant of immunity and avoid answering questions simply because it is

possible and desirable that the pertinent grand jury more closely represent a cross-section of the community.

Consequently, I deem in apposite the proposition advanced by petitioners' able counsel, citing therefor *Christoffel* v. *United States,* 338 U.S. 84 (1949), that no matter what the form of the proceedings, an invalidly selected grand jury cannot be the engine for a successful and valid criminal prosecution. In particular, counsel point to the Court's observation in that case that, "a tribunal that is not competent is no tribunal and it is unthinkable that such a body can be the instrument of criminal conviction". 338 U.S. at p. 90. *Christoffel,* in my view, is distinguishable from the present case. Petitioner Christoffel claimed that a false statement before a Congressional committee which convened without a quorum could not constitute perjury. The Supreme Court upheld his contention. Petitioners here, as already recited, were not charged with contempt until two steps after the grand jury "triggering" proceedings had taken place. If this be viewed as a distinction without a difference, I note that the above quotation from *Christoffel* was esentially *obiter dictum,* which cannot appropriately be extended by this court to cover infirmities in state grand jury selection procedures having no direct impacts upon petitioners' plight.[2a] Moreover, the Court in *Christoffel* was concerned with a question of the authority of a Congressional investigating committee, surely a subject of more traditional and direct scrutiny of the Supreme Court than state jury selection procedures.

[2a] Compare *Witherspoon* v. *Illinois,* 391 U.S. 510 (1968), reh. den. 393 U.S. 898 (1969), where, upon attack of the composition of the state petit jury, the Court quashed the death penalty imposed by that jury but explicitly refused to invalidate the verdict of guilt.

By analogy, it could be said, therefore, that since they were not directly affected by the selection or composition of the second August 1964 grand jury, petitioners are similar to persons who were not members of the class or classes allegedly discriminated against by the claimed exclusions from that tribunal. Since *Fay* v. *New York, supra,* there has been a relatively small but unbroken line of cases, particularly in the Fifth Circuit, which hold that a state habeas petitioner must establish prejudice to himself in order to successfully raise Constitutional issues relating to state jury selection procedures. See, e.g. *Woodruff* v. *Breazeale,* 291 F. Supp. 130 (N.D. Miss. 1967), aff'd. 401 F.2d 997 (5 Cir. 1968); *Salisbury* v. *Grimes,* 406 F.2d 50 (5 Cir. 1969); *Charles* v. *Maxwell,* 348 F.2d 890 (6 Cir. 1965). These and similar authorities rely in substantial part upon the oft-quoted pronouncement of the Supreme Court in *Fay* that the Court ". . . has never entertained a defendant's objections to exclusion from the jury except when he was a member of the excluded class". 332 U.S. at 287.[3] Petitioners' claims, upon parallel reasoning, should not be entertained in this case.

In summary, it seems inescapable that the composition of the second August 1964 grand jury had at best a remote and tangential impact upon petitioners' convictions. Hence, mindful of our federal system, I believe it would be unwise for a federal court to entertain the invitation of these petitioners to apply corrective measures to the state and local

[3] Interesting, the record does not clearly establish that all petitioners are members of the allegedly excluded classes of persons. Four of them are white; only one is black. Also, though I may not have the entire record before me, there does not appear to be clear evidence that any of petitioners were welfare recipients or "poor persons". The only "class", of course, of which they all were members was that of the age group 21 to 35 years.

grand jury procedures of some six years ago. Petition denied.

In light of the difficult and protracted history of this litigation, however, and because I have been unable to find any higher judicial authorities directly in point, this court *sua sponte* grants petitioners a certificate of probable cause in the event they decide to appeal. It is so ordered.

Dated: New York, N. Y.
October 5, 1970.

H. R. TYLER, JR.
U.S.D.J.

RE: *United States ex rel. Chestnut et al.* v. *Criminal Court of the City of New York et al.;* 70 Civ. 2942 HRT.

Motion of petitioners for reargument of this court's opinion and order of October 5, 1970 is granted, but upon reargument, petitioners' plea for modification of said order refusing habeas corpus relief is denied.

Despite the excellence of the briefs of petitioners' counsel—and of the amicus curiae brief of the American Civil Liberties Union, I believe that the new arguments, points and authorities do not require a different result in this unusual and difficult case. Recognizing that in appropriate circumstances a grand jury witness does have standing to challenge the authority, competence and perhaps even composition of that grand jury, I still conclude that under the facts here petitioners fail three important tests of standing: (1) they suffered no significant injury by reason of the composition of August 1964 grand jury; (2) assuming injury to petitioners, it was insufficient to bring their claims

within the zone of proper interest and protective concern of a federal court in state grand jury practices; and (3) another party with clear standing so to do (Epton) has already made the same claims and challenges to the composition of the August 1964 grand jury.

Furthermore, notwithstanding my heretofore expressed concern that at least two of the attacks on the state grand jury may have merit, those matters have already been passed upon by another judge of this court. Even if I were to have the temerity to disagree privately with that decision of Judge Frankel, I believe that orderly procedure and recognition that Judge Frankel gave full consideration to the merits of these claims as raised by Mr. Epton would require me to follow it.

Finally, petitioners' renewed application for bail pending appeal is denied because, among other reasons, previous rulings of the appellate court probably foreclose this court from reconsideration of this issue.

It is so ordered.

November 4, 1970.

H. R. Tyler, Jr.
U.S.D.J.

APPENDIX C

Opinion of the United States Court of Appeals for the Second Circuit, in United States ex rel. Otis Chestnut, et al. v. Criminal Court of the City of New York, et al. (Docket No. 35209), decided September 18, 1970.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 286—September Term, 1970.

(Argued September 16, 1970 Decided September 18, 1970.)

Docket No. 35209

UNITED STATES OF AMERICA *ex rel.* OTIS CHESTNUT, MICHAEL BROWN, STEPHEN MARTINOT, ELLEN SHALLIT, and LEVI LAUB,

Petitioners-Appellees,

—v.—

CRIMINAL COURT OF THE CITY OF NEW YORK; GEORGE F. MCGRATH, Commissioner of Corrections of the City of New York and FRANK S. HOGAN, District Attorney of New York County,

Respondents-Appellants.

Before:

WATERMAN, MOORE and KAUFMAN,

Circuit Judges.

BASIL R. POLLITT, Brooklyn, N. Y., SANFORD M. KATZ, New York City, *for Appellees.*

MICHAEL R. JUVILER, DAVID OTIS FULLER, JR., Asst. District Attorneys, FRANK S. HOGAN, District Attorney, New York County, *for Appellants.*

PER CURIAM:

Appeal from order, United States District Court for the Southern District of New York, Tyler, *J.*, admitting petitioners to bail pending the determination by the district court of the merits of petitioners' application for a writ of federal habeas corpus.

Pending argument of the appeal the order below was stayed by order of Judge Anderson of this court. Inasmuch as there has been a complete hearing below on the merits of petitioners' claim, the case is remanded to the court below for its decision on the merits to be made as soon as possible consistent with due deliberation. In the interim the stay of the district court order admitting petitioners to bail will remain in effect.

APPENDIX D

Opinion dated August 6, 1970 of Judge Robert P. Anderson in the United States Court of Appeals for the Second Circuit in United States ex rel. Otis Chestnut, et al. v. Criminal Court of the City of New York, et al. (Docket No. 35209), denying second application for rehearing of order staying District Court bail order.

#35209

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA *ex rel.* OTIS CHESTNUT, MICHAEL BROWN, STEPHEN MARTINOT, ELLEN SHALLIT and LEVI LAUB,

Petitioners,

—v.—

CRIMINAL COURT OF THE CITY OF NEW YORK, GEORGE F. McGRATH, Commissioner of Corrections of the City of New York and FRANK S. HOGAN, District Attorney of New York County,

Respondents.

Following the ruling on July 31, 1970 and short memorandum after reconsideration on August 3, 1970, petitioners made a second request for reconsideration on August 6, 1970 on the ground that the contempt proceedings were, under §42 of The New York City Criminal Court Act, the equivalent of an indictment as initiating the contempt pro-

ceedings. They again argue that the selection of the grand jury suffered from constitutional infirmities, and its action, therefore, was a nullity. It is my opinion, however, that in spite of the elaborate language and procedures provided in the Act, this initiation of the proceedings, is, in effect, little more than that of a complaining witness. The decision to lodge an information and the subsequent entry of the judgment are the responsibilities of the prosecutor and the court respectively, and in themselves raise no issue warranting interference by the federal courts in the State's administration of its contempt proceedings.

This motion for further reconsideration is denied.

ROBERT P. ANDERSON
United States Circuit Judge

August 6, 1970

APPENDIX E

Opinion dated August 3, 1970 of Judge Robert P. Anderson in the United States Court of Appeals for the Second Circuit in United States ex rel. Otis Chestnut, et al. v. Criminal Court of the City of New York, et al. (Docket No. 35209), denying first application for rehearing of order staying District Court bail order.

#35209

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA *ex rel.* OTIS CHESTNUT, MICHAEL BROWN, STEPHEN MARTINOT, ELLEN SHALLIT and LEVI LAUB,

Petitioners,

—v.—

CRIMINAL COURT OF THE CITY OF NEW YORK, GEORGE F. McGRATH, Commissioner of Corrections of the City of New York and FRANK S. HOGAN, District Attorney of New York County,

Respondents.

Following a request by the petitioners for reconsideration of the ruling of July 31, 1970 which granted respondent's motion for a stay of the District Court's order releasing the petitioners on bail, a review of the case disclosed no reason why the ruling of July 31, 1970 should be

changed, and it is hereby reaffirmed. The petitioners are not accused, indicted by an unconstitutionally selected grand jury but are witnesses called to testify before a grand jury instituted, by the regular procedures of the State of New York, who were granted immunity and later held in contempt by the court for nonetheless refusing to testify. That there may have been some invalidity, even of constitutional dimensions in convening the jury is, in a case of this kind, completely irrelevant. Their affront was to the judicial system of the State and must be dealt with as is perjury in a prosecution based upon an unconstitutional criminal statute. See *United States* v. *Manfredonia*, 414 F.2d 765, 765, note 5 (2 Cir. 1969).

ROBERT P. ANDERSON
United States Circuit Judge

August 3, 1970

APPENDIX F

Opinion dated June 4, 1970 of the Court of Appeals of the State of New York in People v. Otis Chestnut, et al. (No. 146-1970):

COURT OF APPEALS OF NEW YORK

June 4, 1970.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—v.—

OTIS CHESTNUT, MICHAEL BROWN, JEREMIAH GELLES, STEPHEN MARTINOT, ELLEN SHALLIT and LEVY LAUB,

Appellants.

BASIL R. POLLITT and SANFORD KATZ, New York City, for appellants.

FRANK S. HOGAN, Dist. Atty. (David Otis Fuller, Jr. and Michael R. Juviler, New York City, of counsel), for respondent.

FULD, Chief Judge.

The six defendants in this case were charged with criminal contempt (former Penal Law, Consol. Laws, c. 40, § 600, subd. 6) for refusing to answer questions during an investigation by a New York County Grand Jury after they had been granted immunity. After unsuccessfully attempt-

ing to challenge the informations, in both the Federal and State Courts, on the ground that the Grand Jury was unlawfully constituted, the defendants were tried and convicted in the New York City Criminal Court and their convictions were unanimously affirmed by the Appellate Term. On this appeal they argue, among other things, that the Constitution requires all juries to be drawn from a cross section of the community and that the underrepresentation of certain minority groups on the New York County Grand Jury List rendered their convictions invalid.

In December of 1964, each of the defendants was called to appear as a witness before a Grand Jury of New York County, which was conducting an investigation into the activities of three individuals—not the defendants—who were suspected of having played a major role in a series of riots that had occurred in the summer of 1964.[1] The defendants were regarded as "lesser figures in the conspiracy [who had taken] their directions" from others and, before calling them to the stand, the Grand Jury voted to grant them immunity so that they could obtain the evidence needed against the major suspects.

When the defendants were called to testify, the District Attorney informed them of the Grand Jury's decision to grant them immunity and of the fact that they could be held in contempt if they refused to testify. Despite these monitions, however, each refused to answer several ques-

[1] One of the three suspects, William Epton, was eventually indicted and convicted of the crimes of conspiracy to riot and advocacy of criminal anarchy. (See People v. Epton, 19 N.Y.2d 496, 281 N.Y.S.2d 9, 227 N.E.2d 829, app. dsmd. and cert. den. 390 U.S. 29, 88 S.Ct. 824, 19 L.Ed.2d 808.) He subsequently instituted a habeas corpus proceeding in Federal court in which he raised the same arguments asserted by these defendants and was released on bail pending a determination of the question in the State courts. (See United States ex rel. Epton v. Nenna, D.C., 281 F.Supp. 388.)

tions and persisted in his refusal after the foreman of the Grand Jury, at the request of the District Attorney, directed him to respond.[2] As a result, on March 8, 1965, the Grand Jury, with the approval of the Supreme Court, directed the District Attorney to file in the New York City Criminal Court an information against each defendant, charging him with several counts of criminal contempt (N.Y. City Crim. Ct. Act, § 42, subd. [1]).

The defendants then sought to remove the case to the United States District Court, claiming that the "great majority of qualified Negro and Puerto Rican citizens" were excluded from service on grand juries in New York County and that they were, therefore, "denied * * * a right under * * * law[s] providing for the equal [protection of] civil rights of citizens of the United States" (U.S. Code, tit. 28, § 1443, subd. [1]). The District Court decided that it lacked jurisdiction to try the case and, on appeal, the Court of Appeals for the Second Circuit affirmed that decision (Chestnut v. New York, 370 F.2d 1, cert. den. 386 U.S. 1009, 87 S.Ct. 1355, 18 L.Ed.2d 439). In so doing, however, the court noted that the defendants had raised "serious con-

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[2] Under section 2447 of the former Penal Law, immunity is conferred upon a witness when the Grand Jury, at the request of the District Attorney, directs that witness, who has asserted his constitutional privilege, to answer questions put to him and he complies with that directive. It is to be noted that, as long as it follows the statutory formula, the Grand Jury has the power to order the witness to respond, and there is no need to obtain a further directive or order from the court. (See People v. Riela, 7 N.Y.2d 571, 575, 200 N.Y.S.2d 43, 44, 166 N.E.2d 840, 842.) Such court approval would, however, be required if the Grand Jury wished to compel an answer without granting immunity on the ground that the exercise of the privilege was "palpably not in good faith". (People v. Ianniello, 21 N.Y.2d 418, 425, 288 N.Y.S.2d 462, 468-469, 235 N.E.2d 439, 443), cert. den. 393 U.S. 827, 89 S.Ct. 90, 21 L.Ed.2d 98.

stitutional issues" concerning the State's grand jury selection process (370 F.2d, at p. 7).

Returning to the State courts, the defendants applied to the Supreme Court, New York County, "for an order revoking [its] approval" of the Grand Jury's directive to file the informations against them. An extensive hearing was conducted in which the court examined, in detail, the methods and procedures employed for the empanelling of grand juries in New York County. In particular, several officials of the County Clerk's office explained how they compiled the annual list of persons "suitable to serve as grand jurors" which they were required to submit to the County Jury Board (Judiciary Law, Consol. Laws, c. 30, § 609, subd. 1).[3] Their testimony demonstrated that most of the persons on that list had qualified and served as grand jurors in previous years. It further appeared that the names of additional persons were obtained, as vacancies

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[3] Subdivision 1 of section 609 of the Judiciary Law reads, in part, as follows:

"1. Selection of grand jurors. The annual list of persons to serve as grand jurors at the terms of the supreme court for the trial of criminal actions within the city of New York * * * shall be made up in the following manner: the county clerk shall make special investigation of persons qualified to serve as trial jurors. The county clerk shall require each applicant for service as a grand juror to record the fingerprints of his two hands * * *. Such fingerprints shall be promptly forwarded to the central bureau of criminal identification * * * with the request that all information on file as to the previous record, if any, of such person, be forthwith transmitted to the county clerk. * * * [T]he county clerk shall not place the name of such person upon the grand jury list if such person's record contains a conviction for a felony or for a misdemeanor involving moral turpitude. * * *

"The county clerk shall make a list of those persons who, this investigation shows, are suitable to serve as grand jurors. * * * The annual grand jury lists shall be selected therefrom by the respective county jury boards."

occurred, from the County Clerk's list of petit jurors. This was accomplished with the aid of a computer, programmed to eliminate the names of government employees and of persons under 35 years of age and over 65. All others on the petit jury list who had established a satisfactory record of attendance as trial jurors were sent letters enclosing application forms and inviting them to serve as grand jurors. Response to the letter solicitations was poor, only about one third of the persons contacted even troubling to respond.[4] Applications were also received from persons who, unsolicited, appeared at the County Clerk's office, as well as from individuals referred to the office by other grand jurors, the County Grand Jury Association and judges.

The applicants were each requested to appear at the clerk's office for a personal interview at which an official would explain the duties and function of grand jurors and verify the answers on the questionnaire which all prospective jurors in New York City are required to fill out (Rules of Jury System of City of New York, 22 NYCRR 620.2, 620.-18). On the basis of (1) the questionnaire, (2) a credit report and (3) the applicant's criminal record, if any, the County Clerk's office would then decide whether or not the applicant's name should be submitted. All persons on relief and persons against whom judgments of divorce on the grounds of adultery had been entered were rejected, along with those who did not meet the express statutory qualifications contained in section 596 of the Judiciary Law.

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[4] Many of the applicants responding, the record indicates, did so only because of a mistaken belief that they had been effectively summoned and were required to respond. Many others proceeded no further on learning of the demands which service on the Grand Jury would make upon their time, a factor which undoubtedly contributed to the relatively high proportion of "retired" persons among those ultimately selected to serve.

One statutory provision, which, however, was not enforced, was the requirement—since repealed (L. 1967, ch. 49, § 1) —that a juror own property worth in excess of $250. In the year 1964, 144 new applicants were rejected and the remaining applicants, numbering about 200, were added to the list of about 2,000 jurors who had already qualified as grand jurors. Throughout this selection process, the testimony demonstrates, there was no intent or desire to exclude members of minority groups from this list, although it did contain a very small percentage of Negroes and English-speaking Puerto Ricans in relation to their proportion of the population.[5]

Based on the evidence presented, the court at Special Term denied the defendants' motion, stating that "'[w]ant of proportional representation of groups not proven to be deliberate and intentional is not constitutionally offensive.' (Froessel, J., in People v. Agron, 10 N.Y.2d 130, 141, [218 N.Y.S.2d 625, 176 N.E.2d 556] citing Fay v. New York, 332 U.S. 261, 291, [67 S.Ct. 1613, 91 L.Ed. 2043]; Akins v. Texas, 325 U.S. 398, 403, [65 S.Ct. 1276, 89 L.Ed. 1692].)"

Finally, in May of 1967, more than two years after the filing of the information against them, the defendants were brought to trial before a three-judge court in the Criminal Court. The trial consisted, almost entirely, of readings from the transcript of the Grand Jury minutes, and, on the strength of that testimony, each of the defendants was convicted on one or more counts and received sentences ranging from probation to six months in the workhouse. As al-

[5] For example, of the 1,999 persons on the 1964 list whose race could be identified, only 33, or about 1.6% were Negro, despite the fact that, according to the 1960 census, Negroes comprised 24% of the county's adult population. Similar disparities existed in the representation of poor people, blue collar workers and persons who never attended college.

ready noted, their convictions were unanimously affirmed by the Appellate Term.

In evaluating the defendants' argument that the Grand Jury was illegally constituted, it is important to point out that the defendants—who, with exception of the defendant Chestnut, are white—do not claim that they have any evidence that the lack of equal representation by racial minorities on the Grand Jury was the result of a policy of purposeful and intentional exclusion, a course of conduct which would not only violate the Constitution but would render the officials of the County Clerk's office subject to criminal penalties as well (Civil Rights Law, Consol. Laws, c. 6, § 13). Rather, they maintain that, regardless of intent or motivation, the State had an affirmative duty to provide a jury which was made up of a cross section of the community and that the lack of equal representation, whatever its cause, deprived them of their constitutional rights. More specifically, it is the defendants' contention that "[t]he constitutional command for a jury of peers is not merely negative, forbidding active discrimination, [but] It enjoins an affirmative duty upon the state to provide such a jury."

As the defendants recognize, this argument is at odds with out past decisions; in order to sustain a claim of an illegally constituted jury, it is essential, we have held, that *intentional and systematic discrimination* must be proved and that a showing of mathematical disparity, without more, is insufficient to meet this burden. (See, e.g., People v. Horton, 18 N.Y.2d 355, 359-360, 275 N.Y.S.2d 377, 378-379, 221 N.E.2d 909, 910-911, cert. den. 387 U.S. 934, 87 S.Ct. 2059, 18 L.Ed.2d 997; People v. Agron, 10 N.Y.2d 130, 141, 218 N.Y.S.2d 625, 633, 176 N.E.2d 556, 562, cert. den. 368 U.S. 922, 82 S.Ct. 245, 7 L.Ed.2d 136; People v. Des-

saure, 299 N.Y. 126, 85 N.E.2d 900, cert. den. 337 U.S. 949, 69 S.Ct. 1510, 93 L.Ed. 1751.) Thus, for example, in the *Horton* case, 18 N.Y.2d 355, 275 N.Y.S.2d 377, 221 N.E.2d 909, *supra,* the defendant had made a claim similar to that advanced by these defendants, based upon the fact that there was only one Puerto Rican on the panel from which his trial jury was chosen. Noting that, according to the census, some 13.4% of the county's population was of Puerto Rican origin, we wrote (p. 360, 275 N.Y.S.2d p. 379, 221 N.E.2d p. 910):

> "This does not, of itself, indicate a *prima facie* denial of equal protection. *Since there is no evidence of any deliberate, intentional or systematic exclusion of any particular race, appellant's position is untenable.* (People v. Agron, 10 N.Y.2d 130, 140-141, 218 N.Y.S.2d 625, 176 N.E.2d 556 [1961].) Our ruling in *Agron,* equally applicable here, was that a mere showing of imbalance on one particular jury panel does not, without more, demonstrate a denial of a particular defendant's right to equal protection. Here there is neither direct evidence of exclusion of a particular racial group nor evidence of a long-continued pattern of exclusion which prompted the United States Supreme Court's determinations in Patton v. Mississippi, 332 U.S. 463, 68 S.Ct. 184, 92 L.Ed. 76 [1947], and Norris v. Alabama, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074 [1935]. (See Hoyt v. Florida, 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed.2d 118 [1961].)" (Emphasis supplied.)

The defendants, however, point out that the United States Supreme Court has, in recent rulings, considered statistical disparity in passing upon claims of discrimination in the selection of jurors. (See Turner v. Fouche, 396 U.S. 346,

357-360, 90 S.Ct. 532, 24 L.Ed.2d 567; Whitus v. Georgia, 385 U.S. 545, 550-552, 87 S.Ct. 643, 17 L.Ed.2d 599.) From this, they would have us decide that a showing of disproportion in representation is all that is necessary to sustain such a claim. We do not read the Supreme Court's decisions in this way. Study of them indicates that, although a statistical disparity may be used, along with other factors, as evidence in support of a claim of purposeful discrimination, it is not a ground, in itself, for concluding that a jury is impermissibly constituted.

In the *Whitus* case (385 U.S. 545, 87 S.Ct. 643, *supra*), for example, the appellants, in addition to showing a substantial statistical disparity in the representation of Negroes on the jury panel, also established that the names of jurors had been drawn from tax digests which listed Negroes separately from whites. In the court's view, it was the combination of these two factors which "constituted a prima facie case of *purposeful* discrimination" (385 U.S., at p. 551; 87 S.Ct., at p. 647; emphasis supplied). Similarly, in *Turner* (396 U.S. 346, 90 S.Ct. 532, *supra*), it was shown that a substantial statistical disparity had arisen at the one point in the selection process in which the jury commissioners were called upon to use their subjective judgment. In particular, the evidence indicated that 171 out of 178 jurors rejected on grounds that they were not "upright" and "intelligent" were Negroes. The court's conclusion was not that the jury was unlawfully constituted per se but that the appellants had "thereby made out a prima facie case of jury discrimination" which the State failed to overcome (396 U.S., at p. 360, 90 S.Ct., at p. 540).

In the present case, the District Attorney asserts, and it is not denied, that the principal cause for the under-

representation of minority groups on grand juries in New York County is the reluctance of the members of those groups to volunteer for jury duty. Although this is unfortunate,[6] it does not establish that there has been any unconstitutional discrimination against the members of those groups by those involved in the selection process. Nor does the Constitution require, as the defendants maintain, that the present voluntary system be abandoned and replaced by a compulsory system to insure that Negroes will be fully represented on grand jury panels whether they wish to be or not.

The County Clerk's office did, it is true, intentionally exclude welfare recipients, persons adjudged guilty of adultery and persons under the age of 35, and this, the defendants insist, constitutes invidious discrimination even under the traditional standard. We may not, however, say that any of these criteria is so totally lacking in reasonable justification as to render it unconstitutional. The 35-year age limit, for example, was used in the computerized selection of names from the list of trial jurors only as a convenient means of eliminating those who were not likely to have the requisite experience as petit jurors to evaluate the degree of evidence which "would, if unexplained or uncontradicted, warrant a conviction by the trial jury" (Code Crim. Pro. § 251). The age limit was not applied where the names came from judges or other sources. Persons adjudged guilty of adultery were eliminated on the ground that it constituted evidence of moral turpitude, a ground which is not seriously challenged by the defendants. As for the

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[6] It is a source of some satisfaction to note that efforts, conducted by the New York County Clerk's office since 1964, to increase the participation of minority groups on grand juries have met with considerable success.

practice of excluding welfare recipients—a practice which has since been discontinued—it was apparently founded upon an assumption, which may have been erroneous, that it was unlawful for people on welfare to receive money from other governmental sources. Be that as it may, there is no basis for an inference that this criterion was used as a means of discriminating against poor people.

In sum, the record, taken as a whole, establishes that the County Clerk and his staff tried diligently to fulfill their statutory duty to select grand jurors who are "intelligent; of sound mind and good character [and] well informed" (Judiciary Law § 596, subd. 6 [renum. subd. 5 by L. 1967, ch. 49]). By choosing jurors on the basis of these factors, rather than race or ethnic background, their actions were clearly consistent with the policies embodied in the Equal Protection Clause. As the Supreme Court only recently reaffirmed (Carter v. Jury Comm., 396 U.S. 320, 332, 90 S.Ct. 518, 525, 24 L.Ed.2d 549), "The States remain free to confine the selection [of jurors] to citizens, to persons meeting specified qualifications of age and educational attainment, and to those possessing good intelligence, sound judgment, and fair character."

In addition to their challenge to the composition of the Grand Jury before which they were called, the defendants raise several additional arguments for reversal, only one of which has merit. All but one of the defendants were convicted on multiple counts of contempt, even though each of them made it perfectly clear, at the outset, that he would not answer any questions concerning the alleged conspiracy. The District Attorney multiplied the counts by asking them several questions, all of which were related to statements made by one of the suspects at a meeting held on July 30, 1964. In this respect, the case closely resembles People v. Riela, 7 N.Y.2d 571, 200 N.Y.S.2d 43, 166 N.E.2d 840,

in which we held that a witness' statement, after being granted immunity, that he would not answer questions about a particular subject—in that case the notorious "Apalachin" meeting—constituted a single act of contempt, regardless of the number of questions put to him.[7]

The sentencing judges in the case before us, apparently recognizing that the defendants were guilty of only a single act of contempt, directed that the sentences imposed on each of the several counts were to run concurrently. It may well be that the imposition of concurrent sentences eliminated any actual prejudice to the defendants but proper application of the rule required the court to find the defendants guilty of but a single contempt, sentence each of them for that crime and dismiss all the other counts. This result may be accomplished, without the necessity of remanding for resentencing, by simply modifying the judgment.

Before bringing this opinion to a close, we discuss briefly one other point which the defendants raise. Since the questions put to them related to their own conduct, they insist that they were really "targets" of the Grand Jury's investigation and as such could not be compelled to testify even though granted immunity. Their argument is based upon our decision in People v. De Feo, 308 N.Y. 595, 127 N.E.2d 592, which—though subsequently overruled (see People v. Ianniello, 21 N.Y.2d 418, 288 N.Y.S.2d 462, 235

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[7] "What is of significance", we wrote in the *Riela* case, 7 N.Y.2d 571, 576, 200 N.Y.S.2d 43, 46, 166 N.E.2d 840, 842, *supra*, "is that it was apparent from the very start of his interrogation that Riela, relying upon the privilege, would decline to answer any question bearing on the 'Apalachin meeting', and that the questions, different though they were from one another, all related to that one subject. This being so, he is guilty of the single contempt of refusing to give testimony concerning the Apalachin gathering, rather than 17 contempts for refusal to answer individual questions about it."

N.E.2d 439, cert. den. 393 U.S. 827, 89 S.Ct. 90, 21 L.Ed.2d 98, see also, People v. Tomasello, 21 N.Y.2d 143, 287 N.Y.S. 2d 1, 234 N.E.2d 190)—was still in effect at the time they refused to testify. However, what the defendants overlook is that the cases relied upon were concerned with the question whether a prospective defendant who had *not* been granted the complete immunity conferred by section 2447 of the former Penal Law could be held in contempt for his refusal to answer questions. In a case such as the present, where there has been entire compliance with the immunity statute, it has always been the rule that any witness, whether or not a "target" of the investigation, could be required to testify and be subjected to prosecution for contempt should he willfully refuse to do so. (See, e.g., Matter of Gold v. Menna, 25 N.Y.2d 475, 482, 307 N.Y.S.2d 33, 38; People v. Breslin, 306 N.Y. 294, 297, 118 N.E.2d 108, 109.)

In conclusion, then, the defendants willfully refused to testify before a Grand Jury after they had been offered a complete grant of immunity in accordance with the statute. The Grand Jury was a lawfully constituted body, chosen without regard to race or other discriminatory factors and, apart from the fact that—except in the case of the defendant Shallit who was adjudged guilty on only one count—the single act of contempt which each defendant committed was artificially multipled by repetitive questioning, their convictions were entirely proper.

The judgments appealed from should be modified in accordance with this opinion and, as so modified, affirmed.

BURKE, SCILEPPI, BERGAN, BREITEL, JASEN and GIBSON, *JJ.*, concur.

Judgment accordingly.

APPENDIX G

Opinion of Mr. Justice John M. Murtagh in the Supreme Court of the State of New York, New York County, entered April 3, 1967 in the following cases:

People v. *Otis Chestnut*

People v. *Jeremiah Gellis*

People v. *Stephen Martinot*

People v. *Levi Laub*

People v. *Ellen Shallit*

After hearing, the motion is denied. "Want of proportional representation of groups not proven to be deliberate and intentional is not constitutionally offensive." Froessel, J. in *People* v. *Agron,* 10 N.Y.2d 130, 141, citing *Fay* v. *New York,* 332 U.S. 261, 291; *Akins* v. *Texas,* 325 U.S. 398, 403.

APPENDIX H

Opinion of the United States Court of Appeals for the Second Circuit in Otis Chestnut, et al. v. New York (Docket No. 30402) decided December 2, 1966.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

No. 164

(Argued November 9, 1966 Decided December 2, 1966.)

Docket No. 30402

OTIS CHESTNUT, SUSAN KARP, STEPHEN MARTINOT, ELLEN SHALLIT, MICHAEL BROWN, JEREMIAH GELLES, LEVI LAUB, and ROBERT APTER,

Appellants,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

BASIL R. POLLITT, New York City (Sanford M. Katz, New York City, on the brief), *for appellants.*

JOSEPH A. PHILLIPS, Asst. Dist. Atty. (Frank S. Hogan, Dist. Atty., New York County, on the brief), *for appellee.*

Before:

LUMBARD, *Chief Judge*, and
MEDINA and KAUFMAN, *Circuit Judges*.

IRVING R. KAUFMAN, *Circuit Judge*:

The eight appellants claim the right to have the criminal cases pending against them in the state court removed to the federal court on the ground that they will be denied or cannot enforce in the state court their rights arising under a law providing for such equal civil rights.

Appellants have been charged in informations filed in the Criminal Court of the City of New York with criminal contempt under §600(6) of the New York Penal Law, McKinney's Consol. Laws c. 40, for refusing to answer questions propounded by a Grand Jury for New York County investigating the Harlem riots of 1964. Their cases were removed to the federal court pursuant to 28 U.S.C. §1443(1) which provides for removal of an action:

> Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof.

Appellants specifically challenge §596 of the New York Judiciary Law, McKinney's Consol. Laws, c. 30 which requires a grand juror to be "intelligent; of sound mind and good character; well informed," and "the owner * * * of real or personal property of the value of two hundred and fifty dollars"; and §609(1), which requires the county clerk to make a "special investigation" of persons qualified to serve as grand jurors. Appellants allege that the method of

selection results "in the exclusion of the great majority of qualified Negro and Puerto Rican citizens and members of low income groups";[1] therefore, they argue that the Second August 1964 Grand Jury before which they were called to testify was an illegally constituted tribunal and without authority since it was selected in violation of the equal protection clause of the fourteenth amendment, 18 U.S.C. §243,[2] and 42 U.S.C. §1981.[3]

After the cases had been removed to the district court, appellee moved pursuant to 28 U.S.C. §1447(c)[4] to remand the action to the Criminal Court for the City of New York, County of New York. Judge Croake, in a memorandum decision, concluded that the cases had been improvidently removed, and ordered them remanded. This Court denied ap-

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[1] The New York Court of Appeals has twice considered similar claims. In People v. Dessaure, 299 N.Y. 126, 85 N.E.2d 900, cert. denied, 337 U.S. 949, 69 S.Ct. 1510, 93 L. Ed. 1751 (1949), it upheld the Grand Jury selection procedure for Nassau County, while in People v. Agron, 10 N.Y.2d 130, 218 N.Y.S.2d 625, 176 N.E.2d 556, cert. denied, 368 U.S. 922, 82 S.Ct. 245, 7 L. Ed. 2d 136 (1961), it upheld the constitutionality of the Grand Jury selection system for New York County.

[2] "No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude * * * ."

[3] "All persons within the jurisdiction of the United States shall have the same right in every State * * * to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens * * * ."

[4] "If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case * * * . The State court may thereupon proceed with such case."

pellants' motion for a stay pending appeal,[5] but Mr. Justice Harlan as the Circuit Justice granted a stay so that the appeal might be considered by us in light of the *Rachel* and *Peacock* cases, infra, then pending in the Supreme Court but not yet decided, 86 S. Ct. 940, 15 L. Ed. 2d 842 (1966).

I.

We turn our attention initially to the conditions which must be met in order to remove a case under §1443(1). It is essential for removal that the prosecution be "[a]gainst any person who is denied or cannot enforce [one of his civil rights] in the courts of such State," and that the right must be one arising "under any law providing for the equal civil rights of citizens of the United States."

In light of the developments in this area of the law, it seems clear to us that the appellants' contention that the property qualification of §596 of the Judiciary Law and the alleged vagueness of the section violate the equal protection clause of the constitution, does not meet the second requirement for removal. "[T]he phrase 'any law providing for * * * equal civil rights' must be construed to mean any law providing for specific civil rights stated in terms of racial equality. Thus * * * broad contentions under the * * * Due Process Clause of the Fourteenth Amendment cannot support a valid claim for removal under §1443, because the guarantees of those clauses are phrased in terms

[5] It is clear now that the order remanding the case to the state courts is appealable. 28 U.S.C. §1447(d) provides that "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise." The exception was provided by §901 of the Civil Rights Act of 1964, 78 Stat. 266.

of general application available to all persons or citizens, rather than in the specific language of racial equality that §1443 demands." Georgia v. Rachel, 384 U.S. 780, 792, 86 S. Ct. 1783, 1790, 16 L. Ed. 2d 925 (1966). Although the Court does not seem to have decided whether a denial of rights protected by the equal protection clause of the constitution meets the second requirement for removal under §1443(1), its language in *Rachel* would seem to support the view expressed in Peacock v. City of Greenwood, Miss., 347 F.2d 679 (5th Cir. 1965), rev'd on other grounds, 384 U.S. 808, 86 S. Ct. 1800, 16 L. Ed. 2d 944 (1966), that "not every violation of the equal protection clause will justify removal, but only those violations involving discrimination based on race." 347 F.2d at 682.[6] This is in harmony with the purpose of the removal section, as revealed by its history—to protect those rights defined in terms of *racial* equality. Georgia v. Rachel, supra, 384 U.S. at 788-792, 86 S. Ct. 1783. Since §596 does not on its face discriminate in terms of race, appellants' claim of violation of the equal protection clause does not qualify their case for removal. But see Peacock v. City of Greenwood, supra at 684.

II.

Appellants contend, however, that the New York law violates 42 U.S.C. §1981 and 18 U.S.C. §243. Both sections, it appears, provide for "specific civil rights stated in terms of racial equality,"[7] and thus meet the second requirement of

[6] The Supreme Court's language in Rachel casts doubt on our dicta in People of State of N. Y. v. Galamison, 342 F.2d 255, 271 (2d Cir.), cert. denied, 380 U.S. 977, 85 S.Ct. 1342, 14 L. Ed. 2d 272 (1965).

[7] See note 2 and note 3, supra.

§1443(1).[8] It is necessary, therefore, for us to determine whether appellants' claims comply with the language of the section which makes it a condition for removal that the petitioners be "denied or cannot enforce" their rights in the state courts.

The allegations in appellants' petition for removal resemble closely those of the petitioners in Gibson v. State of Mississippi, 162 U.S. 565, 16 S. Ct. 904, 40 L. Ed. 1075 (1896). There it was claimed that 7000 Negro citizens in Washington County, Mississippi, were qualified for jury service, while only 1500 qualified whites resided there; yet, no Negroes had served on grand juries for several years due to deliberate racial discrimination by the officials in charge of selecting jurors. The Supreme Court, in disposing of this charge, stated:

> [T]hese facts, even if they have been proved and accepted, do not show that the rights of the accused were denied by the constitution and laws of the state, and therefore did not authorize the removal of the prosecution from the state court. * * * such evidence would be for consideration of the trial court upon a motion by the accused to quash the indictment, such motion being based on the ground that the indictment against him had been returned by a grand jury from which were purposely excluded, because of their color, all citizens of the race to which he belonged. * * * [A] *removal* * * * could not be ordered upon the ground, simply that citizens of African descent had been improperly excluded, because of their race, and without sanction of the constitution and laws of the state, from

[8] The Supreme Court clearly stated that §1981 meets the statutory definition. City of Greenwood, Miss. v. Peacock, 384 U.S. 808, 825, 86 S.Ct. 1800, 16 L. Ed. 2d 944 (1966).

service on previous grand juries, *or from service on the particular grand jury that returned the indictment against the accused.* Id. at 584, 16 S. Ct. at 908. (Emphasis added.)

But, the Court's decision in *Gibson* was merely an application of the older *Strauder-Rives* doctrine,[9] which held that in order to remove (under an earlier version of §1443 (1)), the petitioner must prove that he "is denied or cannot enforce" his rights in the state courts because of a "formal expression of state law." Georgia v. Rachel, supra, 384 U.S. at 803, 86 S. Ct. 1783.[10] It was not sufficient merely to allege that a statute, fair on its face, was being administered in a discriminatory manner. The reason for this was twofold:

"It ensured that removal would be available only in cases where the predicted denial appeared with relative clarity prior to trial. It also ensured that the task of

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[9] Strauder v. State of West Virginia, 100 U.S. 303, 25 L. Ed. 664 (1879); State of Virginia v. Rives, 100 U.S. 313, 25 L. Ed. 667 (1879). The Court in both cases was interpreting an earlier removal statute, §641 of the Revised Statutes of 1874, the language of which was in almost all respects similar to that now found in §1443(1). Section 641 was also before the Court in Neal v. State of Delaware, 103 U.S. 370, 26 L. Ed. 567 (1880); Bush v. Commonwealth of Kentucky, 107 U.S. 110, 1 S.Ct. 625, 27 L. Ed. 354 (1882); Gibson v. State of Mississippi, 162 U.S. 565, 16 S.Ct. 904, 40 L. Ed. 1075 (1896); Smith v. State of Mississippi, 162 U.S. 592, 16 S.Ct. 900, 40 L. Ed. 1082 (1896); Murray v. State of Louisiana, 163 U.S. 101, 16 S.Ct. 990, 41 L. Ed. 87 (1896); Williams v. State of Mississippi, 170 U.S. 213, 18 S.Ct. 583, 42 L. Ed. 1012 (1897); and Commonwealth of Kentucky v. Powers, 201 U.S. 1, 26 S.Ct. 387, 50 L. Ed. 633 (1906). The Supreme Court did not consider the removal statute again until its decisions in *Rachel* and *Peacock*.

[10] In *Strauder*, the West Virginia statute provided that "All white male citizens who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors, except as herein provided." 100 U.S. at 305.

prediction would not involve a detailed analysis by a federal judge of the likely disposition of particular federal claims by particular state courts. That task not only would have been difficult, but it also would have involved federal judges in the unseemly process of prejudging their brethren of the state courts." Id. at 803-804, 86 S. Ct. at 1796.

It is clear to us, therefore, that under the *Strauder-Rives* doctrine, and its application in Gibson v. State of Mississippi, supra, appellants are not entitled to remove their cases to the federal courts because the alleged denial of their civil rights is not "manifest in the formal expression of state law."

III.

It is contended, however, that the *Strauder-Rives* doctrine, as expanded by the Supreme Court in Georgia v. Rachel, supra, permits removal in the present case. We believe the appellants read the *Rachel* decision much too broadly. The defendants in *Rachel* were to be tried in the state court for violating Georgia's trespass law in seeking to obtain service at a privately owned restaurant open to the public. The Supreme Court had already ruled in Hamm v. City of Rock Hill, 379 U.S. 306, 311, 85 S. Ct. 384, 13 L. Ed. 2d 300 (1964), that the Civil Rights Act of 1964 protected individuals from *prosecutions* in such cases. The Court, therefore, concluded in *Rachel* that removal was proper because "[i]n the narrow circumstances of this case, *any* proceedings in the courts of the State will constitute a denial of the rights conferred by the Civil Rights Act of 1964, as construed in Hamm v. City of Rock Hill," 384 U.S. at 804, 86 S. Ct. at 1796. And, it observed, "It is no answer

in these circumstances that the defendants might eventually prevail in the state court." Id. at 805, 86 S. Ct. at 1797 (footnote omitted).

City of Greenwood v. Peacock, 384 U.S. 808, 86 S. Ct. 1800, 16 L. Ed. 2d 944 (1966), decided the same day, focused again on the standards for removal of a state criminal prosecution to the federal court. There, the defendants were being prosecuted in the Mississippi courts for violating local city ordinances by obstructing the streets while participating in a campaign aimed at increasing Negro voter registration. They alleged that they had been denied their equal civil rights because their arrests and prosecutions were solely for the purpose of harassing and punishing them for protesting racial conditions in Mississippi. They also claimed that they had been denied and could not enforce their rights in the state courts because those courts and the state's law enforcement officers were prejudiced against them and were committed to a policy of racial segregation.

The Supreme Court, however, decided that the order of removal to the federal courts had been improper and distinguished *Rachel* in these terms:

> [N]o federal law confers immunity from state prosecution * * *. It is *not* enough to support removal under §1443(1) to allege or show that the defendant's federal equal civil rights have been illegally and corruptly denied by state administrative officials in advance of trial, that the charges against the defendant are false, or that the defendant is unable to obtain fair trial in a particular state court. * * * The civil rights removal statute does not require and does not permit the judges of the federal courts to put their brethren of the state ju-

> diciary on trial. Under §1443(1), the vindication of the defendant's federal rights is left to the state courts except in the rare situation where it can be clearly predicted by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court. 384 U.S. at 827-828, 86 S. Ct. at 1812 (footnotes omitted).

The precept given to us by the Supreme Court as a result of *Peacock* and *Rachel* is that the right to remove under §1443(1) is not a broad or a recently extended one, as appellants contend; but, indeed, is a right limited in scope. And, a reading of the cases does not disclose that the Court was overruling the *Strauder-Rives* doctrine or Gibson v. State of Mississippi, supra. Indeed, the Court in *Peacock* stated:

> [W]e decline to repudiate those decisions, and we decline to do so not out of a blind adherence to the principle of *stare decisis,* but because after independent consideration we have determined, for the reasons expressed in this opinion and in *Rachel,* that those decisions were correct in their basic conclusion that the provisions of §1443(1) do not operate to work a wholesale dislocation of the historic relationship between the state and the federal courts in the administration of the criminal law. 384 U.S. at 831, 86 S. Ct. at 1814.[11]

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[11] The Court went on to cite some illuminating figures. In fiscal 1963, there were only 14 criminal removal cases in the entire country; and in 1964 the number rose to 43. In 1965, however, in the Fifth Circuit alone, there were 1079 criminal removal cases. The Court concluded, "But this phenomenal increase is no more than a drop in the bucket of what could reasonably be expected in the future." 384 U.S. at 832, 86 S.Ct. at 1815.

IV.

This leads us to the conclusion that we do not have before us a case where the denial of civil rights is "manifest in the formal expression of state law." And, clearly, we are not dealing with any statute which forbids a state prosecution in the circumstances here presented. Nor, do appellants' cases fall within the narrow exception to the *Strauder-Rives* doctrine which the Supreme Court carved out in *Rachel* since the very act of bringing these appellants to trial in the state courts will not inevitably deny them their civil rights.

We believe that the alleged illegality of the New York Grand Jury can be amply litigated in the state courts. It would be unseemly, therefore, for us to prejudge our brethren of the state courts and conclude that appellants will be foreclosed from enforcing their rights in a state forum. The healthy functioning of our federal system is fostered when the administration of the state's criminal laws and the determination of their validity is left in the first instance to the courts of the state.[12]

It should be noted, however, that our conclusion that appellants have not met the requirements of §1443(1) for removal to a federal tribunal at this juncture of the state's prosecution, is in no manner a determination by this Court that §§596 and 609 of the New York Judiciary Law are constitutional. We are confident that in light of recent decisions by the Supreme Court and federal appellate courts in other Circuits, that New York will give careful considera-

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[12] The so-called "abstention doctrine," whereby a federal court will decline to entertain an action even though it has jurisdiction, is based on this same consideration. See, e.g., Dombrowski v. Pfister, 380 U.S. 479, 484-485, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965).

tion to the very serious constitutional issues that appellants raise concerning the State's Grand Jury selection procedures.[13] Only after appellants have litigated their conten-

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[13] The characterization in the State's brief (which consists of a sparse 3 pages) of the appellants' attack on the validity of the Grand Jury as "Quite obviously * * * a lot of nonsense," leads us to believe that the State does not appreciate recent developments in this area of the law. The Supreme Court has recognized the "invaluable function" that the State Grand Jury serves "as a primary security to the innocent against hasty, malicious and oppressive persecution," and by "standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason and was dictated by an intimidating power or by malice and personal ill will." Wood v. Georgia, 370 U.S. 375, 390, 82 S. Ct. 1364, 1373, 8 L. Ed. 2d 569 (1962). While it is true that "[n]either the jury role nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group," Swain v. State of Alabama, 380 U.S. 202, 208, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965), nevertheless, obvious and unexplained differences in the proportion of Negroes and whites on juries when considered in the light of the racial proportions in the population do furnish evidence of systematic exclusion, U. S. ex rel. Seals v. Wiman, 304 F.2d 53, 67 (5th Cir. 1962), cited with approval in Labat v. Bennett, 365 F.2d 698 (5th Cir., August 15, 1966). And token summoning of Negroes for jury service does not meet constitutional requirements. Brown v. Allen, 344 U.S. 443, 471, 73 S. Ct. 397, 97 L. Ed. 469 (1953).

The Supreme Court's recent decision in Louisiana v. United States, 380 U.S. 145, 85 S. Ct. 817, 13 L. Ed. 2d 709 (1965), raises questions with respect to the validity of the requirement of §596 that a grand juror be "intelligent; of sound mind and good character; well informed," and on the constitutionality of the "special investigation" of potential grand jurors conducted by the county clerk pursuant to §609. But see Brown v. Allen, 344 U.S. 443, 472-474, 73 S. Ct. 397, 97 L. Ed. 469 (1953); Fay v. People of State of New York, 332 U.S. 261, 67 S. Ct. 1613, 91 L. Ed. 2043 (1947) (New York's "blue ribbon" jury upheld). In the *Louisiana* case, the Court found unconstitutional a state requirement that voters be able to interpret any part of the Louisiana or United States constitution. This provision, it held, violated the fifteenth amendment because of the arbitrary power that it gave to state election officials to pick and choose by their own standards who can or cannot vote.

More recently, in Rabinowitz v. United States (5th Cir., July 20, 1966), 366 F.2d 34, the Court of Appeals, in finding that the method of selection of federal jurors in Georgia violated a federal statute, stated that "the desire for competency must not by [sic]

tions in the state courts may they be heard in the federal system.[14]

Affirmed.

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pursued to the extent that a fair cross-section is prevented [from serving]." Id. at 55 (footnote omitted). The court rejected the defense that the jury commissioners had not specifically intended to exclude Negroes from the juries. "The jury commissioners must be held to have intended the natural result which flowed from their conduct. * * * The Constitution and laws of the United States place an affirmative duty on the court clerk and the jury commissioner to develop and use a system that will probably result in a fair cross-section of the community being placed on the jury rolls." Id. at 57 (footnote omitted).

The constitutionality of the requirement contained in §596 that a grand juror be "the owner of real and personal property of the value of two hundred and fifty dollars," also raises interesting questions for resolution. In Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966), the Supreme Court invalidated Virginia's poll tax, finding that it was a violation of equal protection to make affluence a standard for voting. And the Fifth Circuit in *Labat*, supra, found that a Louisiana statute for selecting jurors, while fair on its face, was administered in a discriminatory manner when "daily wage earners" were excluded from jury duty. The state officials maintained that these individuals were excluded in order to relieve them from the economic burden that jury duty would involve. But, most of the individuals in the "daily wage earners" category turned out to be Negroes. The Court concluded that "exclusion of daily wage earners *as a class* violates the petitioner's due process and equal protection rights to an impartial jury representing a cross-section of the community." But see Brown v. Allen, supra; Fay v. People of State of New York, supra.

The Supreme Court may soon shed more light on the law in the area of alleged discrimination in the selection of jurors. We note that the Court has recently granted certiorari in Bostwick v. South Carolina, 87 S. Ct. 102 (Oct. 10, 1966), and Whitus v. Georgia, 87 S. Ct. 183 (Oct. 10, 1966).

[14] "If they go to trial and there is a complete absence of evidence against them, their convictions will be set aside because of a denial of due process of law. Thompson v. City of Louisville, 362 U.S. 199 [80 S. Ct. 624, 4 L. Ed. 2d 654]. If at their trial they are in fact denied any federal constitutional rights, and these denials go uncorrected by other courts of the State, the remedy of federal habeas corpus is freely available to them. Fay v. Noia, 372 U.S. 391 [83 S. Ct. 822, 9 L. Ed. 2d 837]. If their federal claims at trial have been denied through an unfair or deficient fact-finding process, that, too, can be corrected by a federal court. Townsend v. Sain, 372 U.S. 293 [83 S. Ct. 745, 9 L. Ed. 2d 770]." City of Greenwood v. Peacock, supra, 384 U.S. at 829, 86 S. Ct. at 813.

APPENDIX I

Memorandum and Order of the United States District Court for the Southern District of New York in Otis Chestnut, et al. v. New York (65 Civ. 1574) entered February 10, 1966.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

65 Civ. 1574

OTIS CHESTNUT, SUSAN KARP, STEPHEN MARTINOT, ELLEN SHALLIT, MICHAEL BROWN, JEREMIAH GELLES, LEVI LAUB, and ROBERT APTER,

Petitioners,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

CROAKE, *District Judge*:

This is a motion by the respondent, pursuant to 28 U.S.C. § 1447(c),[1] remanding the action to the Criminal Court of the City of New York, County of New York.

Petitioners have been charged in informations with criminal contempt following their refusals to answer questions

[1] "If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case."

before the Second Grand Jury of the County of New York for the August 1964 term. The petition for removal, pursuant to 28 U.S.C. § 1443,[2] filed on May 24, 1965, states the following:

> "3. The Second August, 1964 Grand Jury was, and is, an illegal tribunal and without authority and null and void in that its members were deliberately chosen, selected and appointed in such a manner, and by such procedures, as to result in the exclusion of the great majority of qualified Negro and Puerto Rican citizens and members of low income groups in New York County from the Grand Jury rolls, and to result in the selection of a disproportionate number of upper class non-Negroes and non-Puerto Ricans for Grand Jury service, all in violation of the Equal Protection clause of the Fourteenth Amendment and of Title 18 U.S.C. Section 243.[3]
>
> "4. The selection of grand jurors in New York County is governed by Section 609 of the Judiciary Law.
>
> "5. That section provides that the County Clerk shall first make a 'special investigation of persons

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[2] 28 U.S.C. §1443(1) provides for the removal of an action "Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof."

[3] 18 U.S.C. §243 provides that: "No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in "any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000."

qualified to serve as trial jurors.' The County Clerk is directed to make a list of those persons who, the aforementioned special investigation shows, 'are suitable to serve as grand jurors.' It is from this list that the annual grand jury list is selected. It is from the annual list that grand jurors are selected for each term of the Supreme Court and ultimately for a particular panel.

"6. The manner in which Section 609 of the Judiciary Law relating to the selection of grand jurors is applied is unconstitutional in that the 'special investigation' conducted by the County Clerk consists mainly in ascertaining the financial and economic status of the person under investigation which in practice invariably means that persons of other than high income or considerable assets are never, or rarely, selected.

"7. Inasmuch as the great majority of Negroes and Puerto Ricans in New York County are not in the high income group, the method of selection of grand jurors necessarily serves to exclude them from serving as grand jurors.

"8. This pattern of exclusion is necessarily perpetuated inasmuch as most persons who serve on grand juries volunteer for service over and over again. Thus, the grand jury list, the annual list and the venue from which a particular panel is selected will invariably contain the names of those persons who have theretofore passed the 'special investigation' test.

"9. As a result of the foregoing only a token few Negroes and Puerto Ricans have ever had their names

included on the grand jury lists for New York County or been selected for grand jury duty.

"10. The particular Grand Jury before which the petitioners were compelled to appear did not contain one Negro or Puerto Rican.

"11. Upon information and belief the average annual income of the members of the said Grand Jury was $20,000. Each and every member thereof was in the upper or upper-middle income bracket.

"12. There are thousands upon thousands of Negro and Puerto Rican citizens of New York County who are qualified to serve as grand jurors who by reason of the foregoing are not permitted to do so.

"13. The said Second August, 1964 Grand Jury in questioning the petitioners was purportedly engaged in the investigation of the activity of petitioners and the activities of others associated with them in the Harlem riots of July 1964 and in other protests and demonstrations directed or resulting from racial discrimination.

"14. By reason of the illegal composition of the Second August, 1964 Grand Jury, and by reason of the nature of the investigation, petitioners in being questioned were deprived of equal protection of the laws and their rights under Title 18 U.S.C. Section 243, and no prosecution for contempt can be based on their refusals to answer questions before said Grand Jury."

Petitioners sought the holding of a hearing concerning the alleged "systematic exclusion of Negroes and Puerto Ricans and persons other than high income status from

Grand Juries in New York County," and a dismissal of the prosecutions.

In support of the instant motion, it is urged that the petition is defective on its face for failure to state facts, that the doctrine of the Supreme Court cases ending with *Kentucky* v. *Powers,* 201 U. S. 1 (1906), limiting the application of 28 U.S.C. 1443(1) to denial by state laws rather than state practice, bars removal and apparently also, by the citation of *People* v. *Agron,* 10 N. Y. 2d 130, 218 N. Y. S. 2d 625, 633 (1961), *cert. denied,* 368 U. S. 922 (1961), that absent an allegation of intentional discrimination, a cause for removal is not stated.

After a careful examination of the arguments raised and cases cited, the court is of the opinion that it may not appropriately read the principle of the *Powers* line of cases so as not to include the instant petition and that therefore removal may not be had. Admittedly, that doctrine has been questioned, see *People* v. *Galamison,* 342 F. 2d 255, 271-2[4] and the concurring opinion of Judge Kaufman at 273 (2d Cir. 1965), *cert. denied,* 380 U. S. 977 (1965), and limited in its scope by several recent Fifth Circuit decisions. See *Cox* v. *State of Louisiana,* 348 F. 2d 750, 53-5 (June 29, 1965); *Peacock* v. *City of Greenwood,* 347 F. 2d 679, 680-84 (June 22, 1965), *cert. granted,* 34 LW 3237, January 17, 1966; *Rachel* v. *State of Georgia,*

[4] The court there noted that the question was then before the Fourth Circuit in *Baines* v. *City of Danville,* No. 9080, and *McGhee* v. *City of Danville,* No. 9082. See *Baines* v. *City of Danville,* 337 F. 2d 579, 602 (1964), where that court, which had heard the cases en banc, granted the petition for rehearing of this issue (per curiam). Research by the court did not disclose a decision in this matter and, on January 27, 1966, by a telephone call to the Deputy Clerk of the Fourth Circuit, it was learned that the court, with two judges dissenting, had rendered an opinion on January 21, 1966, concluding that the causes had been properly remanded. A petition for certiorari was filed on January 28, 1966. See 34 LW 3267.

342 F. 2d 336 (March 5, 1965), *cert. granted,* 382 U. S. 808 (October 11, 1965). However, these cases do not appear to so confine the doctrine as to warrant a determination by a district court not to apply it in the instant circumstances. In *Peacock,* it was stated that:

> "In our view, . . . [the prior Supreme Court cases] establish only that, in order to establish removal jurisdiction, the denial of equal rights through the systematic exclusion of Negroes from grand and petit juries must result from state legislative or constitutional provisions." 347 F. 2d at 683.

Notwithstanding the following passages that:

> "The stated rationale for this rule was that the deprivation of protected rights had to be shown in advance of trial. However, this reasoning gives way to the fact that the illegality of a grand jury indictment springing from a systematic exclusion would be susceptible of proof prior to trial. The rationale was also advanced in these decisions that questions other than those arising from the terms of the statute should be left to state courts for vindication. This does not follow for state courts are bound under the Federal Constitution to protect a litigant from the loss of rights even in the case of express language in a state statute." Id. at 683-4,

it was stated, at p. 684, that:

> "[Those cases] . . . dealt only with the systematic exclusion question, a question which in turn goes to the very heart of the state judicial process, and federalism may have indicated that the remedy in such

situations in the first instance should be left to the state courts. We would not expand the teaching of these cases to include state denials of equal civil rights through the unconstitutional application of a statute in situations which are not a part of the state judicial system but which, on the contrary, arise in the administration of a statute in the arresting and charging process."

Accordingly, the motion to remand the cause to the Criminal Court of the City of New York is granted.

So ORDERED.

Dated: New York, N. Y.
February 9, 1966

THOMAS F. CROAKE
U. S. D. J.